

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4034

CONTINENTAL STOCK TRANSFER AND TRUST COMPANY
(A Limited Purpose Trust Company) And
GENERAL STOCK TRANSFER COMPANY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of
the Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND
EXCHANGE COMMISSION, RESPONDENT

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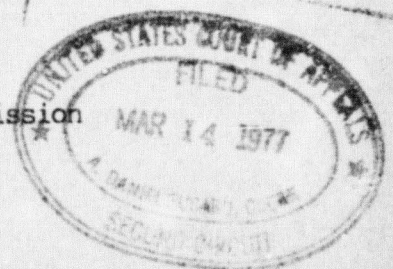
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ANSWERING BRIEF OF THE SECURITIES AND
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COUNTERSTATEMENT OF THE ISSUE

Did the Commission act arbitrarily or capriciously in denying the petitioners' request for confidential treatment of information, where the information released was not exempt from disclosure under the Freedom of Information Act and substantially all of the information was and is publicly available in various standard reference services?

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Continental Stock Transfer and Trust Company and General Stock Transfer Company (the "petitioners") have petitioned this Court, pursuant to Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), to review an order of the Securities and Exchange Commission entered on December 17, 1976, (R 21-22), 1/ denying confidential treatment for certain, predominately public, information submitted to the Commission by the petitioners in connection with their application for registration as transfer agents.

Facts

On November 10, 1975, each petitioner filed with the Commission an application for registration as a transfer agent on Commission Form TA-1, pursuant to Section 17A(c) of the Securities Exchange Act of 1934, as amended, (the "Act"), 15 U.S.C. 78q-1(c), 2/ and Commission Rule 17Ac2-1

1/ References to pages in the record of this proceeding are cited as "R ____." The record, filed on February 11, 1977, has been superseded by a supplemental record filed on March 8, 1977. No appendix will be filed in this case because the record is being filed in toto. The documents as to which confidential treatment was sought were filed with this Court under seal.

2/ Section 17A(c) was added to the Act by Section 15 of the Securities Acts Amendments of 1975 (P.L. 94-29), and became effective as of December 1, 1975. Section 17A(c) provides that, unless registered with the Commission in accordance with that section, transfer agents are prohibited from using the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to certain securities.

thereunder, 17 CFR 240.17Ac2-1. 3/ The application forms were accompanied by a letter of transmittal (R 1-2) from the petitioners' counsel, Jesse R. Meer, Esq., requesting that the names of the issuers of securities for whom the petitioners act as transfer agents ("issuer lists") "be treated as confidential 'commercial information' and 'trade secrets.'" A page inserted in the Form TA-1 of each petitioner contained a similar request for confidentiality. 4/

3/ Rule 17Ac2-1 requires, in pertinent part, that an

"application for registration, pursuant to Section 17A(c) of the Act, of a transfer agent * * * shall be filed with the Commission on Form TA-1, in accordance with the instructions contained therein and shall become effective on the thirtieth day following the date on which the application is filed, unless the Commission takes affirmative action to accelerate, deny or postpone such registration in accordance with the provisions of Section 17A(c) of the Act."

4/ Item 7 of Form TA-1 requires an applicant, inter alia, to list on Schedule B to the Form issuers of securities which it services as transfer agent, co-transfer agent, registrar or co-registrar. In each Form TA-1 filed by the petitioners, there was included with the list on Schedule B, a cover sheet stating:

"The attached list of accounts has been prepared in answer to the item referenced above [Schedule B of Form TA-1, Item #7]. It is hereby requested that this list be kept absolutely CONFIDENTIAL: that it not be released or made public. Registrant considers its list of accounts to be a trade secret."

(R 34, 54.)

On July 23, 1976, the staff of the Commission's Division of Market Regulation (the "Division") denied the petitioners' request for confidential treatment of the names of the issuers of securities for which they act as transfer agents (R 10-11). 5/ On August 9, 1976, the petitioners requested that the Commission review the staff's denial of their application for confidential treatment (R 14-20). On December 17, 1976, the Commission denied the petitioners' application for confidential treatment on the grounds that the

"(i) Petitioners have failed to demonstrate that the information at issue constitutes trade secrets or privileged or confidential commercial information exempt from disclosure, or information otherwise exempt from disclosure, pursuant to the Freedom of Information Act (5 U.S.C. 552(b)), Section 24 of the Securities Exchange Act of 1934, and the Commission's rules concerning disclosure of records, 17 CFR 200.80(b); and

"(ii) Petitioners have failed to conform to the procedures specified under Rule 24b-2, 17 CFR 240.24b-2." (R 22). 6/

5/ The Commission has delegated authority to the Directors of its Divisions of Market Regulation and Corporation Finance, 17 CFR 200.30-3(a)(20) and 17 CFR 200.30-1(d)(3), respectively, to grant or deny applications for confidential treatment filed pursuant to the Securities Exchange Act. The Commission reviews their decisions pursuant to 17 CFR 201.26(b)(5).

6/ The Commission also noted that the

"Petitioners did not physically segregate [from the Form TA-1] the information for which confidentiality was requested and did not, in * * * [the Commission's] judgment, offer a sufficient discussion of the grounds and justification for an exemption from disclosure"

as required by Securities Exchange Act Rule 24b-2 (R 21).

On January 17, 1977, the Commission issued an order denying the petitioners' request for a stay pending determination of this appeal (R 27-28), but granting a temporary stay of its order "so as to give Petitioners the opportunity to seek a stay from the Court of Appeals" (R 28). On February 8, 1977, this Court granted the petitioners' motion for a stay pending review of the Commission's order. The material for which confidentiality was requested has been, and still is being, withheld from the public.

STATUTES AND RULES INVOLVED

Pertinent portions of the Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq., and the Freedom of Information Act, 5 U.S.C. 552, et seq., and the Commission's rules under both acts are set forth in the statutory appendix to this brief.

ARGUMENT

THE PETITIONERS HAVE NOT SUSTAINED THEIR HEAVY
BURDEN OF DEMONSTRATING THEIR ENTITLEMENT TO
CONFIDENTIAL TREATMENT FOR LARGELY PUBLIC INFORMATION.

Prior to 1975, Section 24 of the Securities Exchange Act, 15 U.S.C. 78x (1972), precluded the Commission from making available to the public information for which confidential treatment had been requested unless, "in its judgment a disclosure of such information is in the public interest." Congress, in the Securities Acts Amendments of 1975 (P.L. 94-29), amended Section 24 precisely to reverse this presumption of non-disclosure. Thus, as amended, Section 24 provides, in effect, that the Freedom of Information

Act, 5 U.S.C. 552 ("FOIA"), governs the Commission's release of information, including information for which confidential treatment is sought. ^{7/} Indeed, as the Report of the Senate Committee on Banking, Housing and Urban Affairs on the Securities Acts Amendments of 1975 stated:

"As amended, Section 24(a) would expressly define all applications, * * * and other documents filed with or otherwise obtained by the Commission pursuant to the Exchange Act or otherwise as 'records' for the purposes of the Freedom of Information Act, 5 U.S.C. 552. Accordingly, all requests for information from the Commission would be governed by the provisions of that Act." (Emphasis supplied.) ^{8/}

This Court's review of the Commission's denial of the petitioners' request for confidential treatment is, therefore, a review based upon the standards of the FOIA. And, that Act imposes a heavy presumption in favor of public disclosure. As the Supreme Court has repeatedly observed, the "limited exemptions" provided by the FOIA "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." Department of the Air Force v. Rose, 425 U.S. 352, 361(1976); see also, Environmental Pro-

^{7/} Section 24 now provides, inter alia, that it shall be unlawful for

"any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission * * * any information contained in any application * * * or other document filed with * * * the Commission (1) in contravention of the rules and regulations of the Commission under Section 552 of Title 5, United States Code, [the FOIA], or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information."

^{8/} S. Rep. No. 94-75, 94th Cong., 1st Sess. at 136-137 (1975).

tection Agency v. Mink, 410 U.S. 73, 79 (1973). Thus, while some courts have entertained so-called "reverse-FOIA" suits -- that is, suits in which a party who has furnished information to the government seeks to prevent the government from disclosing that information -- 9/ under the FOIA it is well-established that the burden is on the party desiring to have materials withheld from the public to provide a justification for non-disclosure. Cf., Sears, Roebuck & Co. v. General Services Administration, 384 F. Supp. 996, 1001(D. D.C. 1974) modified in other respects, 402 F. Supp. 378 (D. D.C., 1975); Tax Analysts & Advocates v. Internal Revenue Service, 362 F. Supp. 1298, 1301 (D. D.C., 1973), affirmed on this point, modified in other respects, 505 F. 2d 350, 353(C.A. D.C., 1974). The petitioners have not met this burden, nor have they demonstrated that the Commission, in denying their requests that their "issuer lists" be kept confidential, acted arbitrarily or capriciously or contrary to law. 10/

9/ See Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190 (C.A. 4, 1976); and Charles River Park "A," Inc. v. Department of Housing and Urban Development, 519 F. 2d 935 (C.A.D.C., 1975).

10/ While the Commission, of course, did enter an "order" denying the petitioners' request for confidentiality, and orders are generally reviewable in an appellate court, in light of the Congress' express direction that "all requests for information from the Commission would be governed by the provisions of [the FOIA]," S. Rep. No. 94-75, supra, at 137. It is at least questionable whether review is proper in this Court at all, since reverse-FOIA suits have been held to contemplate district court review under the Administrative Procedure Act, 5 U.S.C. 551, et seq.

Putting jurisdiction to one side, however, we agree with the petitioners' contention (Pet. Br. 23) that, in this Court's review of the Commission's action, the standard is whether the Commission action was arbitrary or capricious, or constituted a gross abuse of discretion.

1. The petitioners' "issuer lists" are not exempt from disclosure under the Freedom of Information Act.

The petitioners' contention that their "issuer lists" are entitled to confidential treatment is founded on Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), which provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (emphasis supplied). The petitioners do not contend, however, that their "issuer lists" are "trade secrets" within the meaning of the FOIA (Pet. Br. 9-14).^{11/} In addition, substantially all of the information for which the petitioners seek confidential treatment is publicly available in standard reference services, discussed infra at pages 12 - 13. Therefore, it cannot be deemed "privilege or confidential" "commercial or financial information"--withing the scope of the fourth exemption.

We agree with the petitioners that some "customer lists" could be exempted under the FOIA's (b)(4) exemption.^{12/} But, even if an "issuer list" could be properly characterized, as it is by the petitioners, as a "customer list," that appellation alone cannot convert essentially public infor-

^{11/} While "trade secrets" are not defined in the FOIA, the courts have held that a trade secret is "an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities." (citations omitted) United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission, 6 F. 2d 491, 495 (C.A. D.C., 1925), reversed on other grounds, 274 U.S. 106 (1927). See Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 801 (S.D. N.Y., 1969), appeal dismissed, 436 F. 2d 1363 (C.A. 2, 1971). We are unaware of any court decision holding that customer lists are trade secrets for the purpose of the FOIA.

^{12/} Cf., National Parks and Conservation Association v. Morton, 498 F. 2d 765 (C.A.D.C., 1974).

mation into confidential information. Moreover, even though the Senate Judiciary Committee Report on the FOIA, 13/ to which the petitioners refer, points to "customer lists" as an example of the type of information potentially eligible for confidential treatment under Exemption 4, it is implicit in that report that, in order for such information to be withheld pursuant to the FOIA, it must be secret -- that is, "confidential" -- and must not be a matter of public knowledge or of general knowledge in a particular trade or business. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974); accord, Mayview v. Rodstein, 480 F. 2d 714, at 718, n. 7 (C.A. 9, 1973).

Thus, even assuming, arguendo, that the petitioners' "issuer lists" were "commercial or financial information," the question remaining is whether the information in question is "confidential." 14/ But the test of confiden-

13/ S. Rep. No. 813, 89th Cong., 2nd Sess. 9 (1965). The report further states that

"[t]his exception is necessary to protect the confidentiality of information * * * customarily not * * * released to the public by the person from whom it was obtained."

In the instant case, however, substantially all of the information in question already has been disclosed by the issuers of securities which use the petitioners' transfer agent services, and is published in several standard reference works (R 61-62). Therefore, this legislative history cannot be used to support the petitioners' request for confidential treatment, and, in fact, the courts have so held in analogous contexts. See, National Parks and Conservation Assoc. v. Morton, supra, 498 F. 2d at 767.

14/ The petitioners do not argue that the information in question is, in any sense, "privileged."

tiality is a rigorous one, as the Court of Appeals for the District of Columbia Circuit has repeatedly held:

"[C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained" (emphasis added). 15/

Charles River Park "A," Inc. v. Department of Housing and Urban Development, 519 F. 2d 935, 940 (C.A. D.C., 1975), quoting National Parks and Conservation Association v. Morton, 498 F. 2d 765, 770 (C.A. D.C., 1974). 16/ Certainly the disclosure of the petitioners' "issuer lists" would not impair the Government's ability to obtain necessary information in the future, since

15/ There is no statutory definition of the term "confidential" as used in the FOIA.

16/ The petitioners cite two older cases, Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F. 2d 578 (C.A. D.C., 1970), and Sterling Drug, Inc. v. Federal Trade Commission, 450 F. 2d 698 (C.A. D.C., 1971), for the proposition that

"the essential question in applying 5 U.S.C. §552(b)(4) to documents is whether the information sought is a type 'which would customarily not be released to the public by the person from whom it was obtained.'" (Pet. Br. 11-12, quoting Sterling Drug, Inc., supra, 450 F.2d at 709.)

However, the Court of Appeals for the District of Columbia Circuit, in a more recent case, National Parks, supra, 498 F. 2d at 767, noted

"Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of section 552(b)(4). A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption."

the information is required to be filed by all transfer agents registering with the Commission. 17/

In addition, the petitioners did not, and can not, show any "substantial harm," since (1) the information is already publicly available to any competitor who would care to compile it, and (2) all transfer agents in a similar position have filed comparable information with the Commission without asserting a claim of competitive disadvantage.

17/ The petitioners (Pet. Br. 23-27) argue that the "[t]he Commission exceeded its authority or otherwise abused its discretion by requiring transfer agents to supply a list of all customers with securities registered pursuant to Section 12 of the Act, without regard to materiality or some other qualifying criteria." (Pet. Br. 23).

This issue is not properly before the Court. Section 25(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(c)(1), provides:

"No objection to an order or rule of the Commission, for which review is sought under this Section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."

While the petitioners did argue that "[p]ublic disclosure of the identity of all of Petitioner's customers * * *, is unnecessary" (R 16), the petitioners did not question the Commission's authority to require the information before the Commission nor do they state any grounds for their failure to do so. Accordingly, this issue should not be considered by this Court. Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 468 (C.A. 2), certiorari denied, 361 U.S. 896 (1959); Lile v. Securities and Exchange Commission, 324 F. 2d 772, 773 (C.A. 9, 1963); Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F.2d 798, 801 (C.A.D.C., 1965). Nor did the petitioners propose to the Commission, as they argue here, that "the stated goals of Section 17A could be obtained without requiring disclosure of the identity of all of a transfer agent's customers" (Pet. Br. 24) (emphasis in original).

(footnote continued)

Thus, virtually all of the information for which the petitioners seek confidential treatment is contained in a single library reference volume, the Financial Stock Guide Service Directory of Active Stocks ("FSGS") (1976 ed.), published by Financial Information, Inc. This directory purports to list "all companies which currently have stock outstanding in the hands of the general United States and Canadian public" (R 61). A sample FSGS page is appended, showing the manner in which this information is published. 18/ The petitioner Continental Stock Transfer & Trust Company's Schedule B shows

17/ (footnote continued)

In any event, the Commission did not exceed its authority or otherwise abuse its discretion by requiring the registrants to list the issuers of the issues of securities for which they act as transfer agents. Section 17A(c)(2) states that the Commission "may prescribe as necessary or appropriate in the furtherance of the purposes of the section." "[A form] containing * * * information and documents concerning [transfer agents allowed to register with the Commission]." In order to facilitate the establishment of a national system for the clearance and settlement of securities transactions, the Commission first must determine the identity of the participants in the system and the nature and extent of the clearance and settlement functions they perform.

Thus, in the case of transfer agents, which play a vital role in the clearance and settlement of securities transactions, the Commission must obtain information not only identifying those transfer agents which are required to be registered with it, but also identifying the issuers and issues of securities which each registered transfer agent services. This is precisely the information the Commission has sought to obtain in the "issuer lists" required to be filed in Schedule B to Form TA-1.

18/ Exhibit A. The name (or names) of the transfer agent is the first non-parenthetical information following the issuer's name and the issues outstanding.

420 issuers (R 35-48), of which 390, or 93 percent, are found in FSGS. 19/ The petitioner General Stock Transfer Company's Schedule B lists 19 issuers (R 55), of which 18, or 95 percent, are listed in FSGS (R 61-62). A few of the remaining issues of securities for which the petitioners act as transfer agents but which are not set forth in the FSGS, are found in the CCH Stock Transfer Guide Directory (1976 ed.), published by Commerce Clearing House, Inc., and/or in Moody's OTC Industrial Manual (1976 ed.), published by Moody's Investors Services, Inc. 20/ Thus, because substantially all of this information is readily obtainable, it cannot be viewed as confidential, and release of the information by the Commission will not cause the requisite "substantial harm to the [petitioners'] competitive position." 21/ Charles River Park "A," Inc., supra, 519 F. 2d at 940. See also Mayview v. Rodstein, 480 F. 2d 714, 718-719, n. 7 (C.A. 9, 1973).

19/ (R 61-62.) These calculations are based upon the Schedule B to Form TA-1 filed on November 11, 1975, by Continental (R 29-48), as they compare to the 1976 Edition of the FSGS.

20/ (R 61-62.) Sometimes the petitioners' Forms TA-1 showed a multiple listing for an issuer because it transfers more than one of the issuer's classes of securities (R 35,36,55). In our calculations, we have counted each issuer only once.

21/ The petitioners nonetheless argue (Pet. Br. 6-9) that the Commission failed to give due consideration to the expressed objectives of Section 17A of the Act." (Pet. Br. 6.) The focus of their contention in this regard is a directive in Section 17A(a)(2), that, inter alia, the Commission shall have "due regard for * * * [the] maintenance of fair competition among * * * transfer agents" when administering Section 17A.

But it is the petitioners' position, not the Commission's, that raises the spectre of unfair competition. The petitioners not only seek to withhold information from the public, broker-dealers and their competitors about their regulated activities, they seek to preserve some self-perceived advantage over their competitors, who already have complied with the law and made full disclosure.

The petitioners acknowledge the existence of these services (Pet. Br. 14-15) and admit that the transfer agents for various issuers of securities are identified therein (Pet. Br. 15-16). Nevertheless, the petitioners contend that, because "these publications are arranged according to issuer," rather than by transfer agent, this information should not be made public in the form in which they filed it with the Commission. (Pet. Br. 15, emphasis in original.) The petitioners overstate the importance of the format in which the information is published, however, when they state that "[a]lmost any information can be obtained with the expenditure of sufficient time, money and energy, and consequently, the Commission's theory would presumably preclude confidential treatment of any commercial or financial information, a patently unacceptable result." (Pet. Br. 15-16.) Indeed, the "large banks with transfer agent departments" and the "institutional transfer agents" (Pet. Br. 8, 13), which the petitioners fear would benefit from the disclosure of the petitioners' issuer lists, could, because of their "size and power" (Pet. Br. 13), easily construct such lists from the public sources we mentioned. The mere fact that some time and energy would have to be expended in order to extract the issuers for which the petitioners act as transfer agent does not make this information unavailable to the public.

Thus, the Commission did not act arbitrarily or capriciously in determining that the petitioners failed to demonstrate that their "issuer lists" are "commercial or financial information obtained from a person and * * * confidential" within the meaning of Exemption 4 (R 22). While the "issuer lists" are commercial information obtained from a person, they are not confidential, because, as we have already shown and as the Commission found

(R 21), they are already substantially publicly available. These "issuer lists" were not entitled to be exempted from disclosure pursuant to the Exemption 4. National Parks and Conservation Association v. Morton, supra, 498 F. 2d at 766 (C.A. D.C., 1974).

In any event, even if the "issuer lists" were "commercial or financial information obtained from a person and privileged or confidential," which they are not, the Commission is not required by Exemption 4 to withhold such information from its public files. The petitioners' view (Pet. Br. 9-19) -- that the FOIA protects information from disclosure -- is an incorrect interpretation of the FOIA. Under the FOIA, disclosure is the rule. Environmental Protection Agency v. Mink, supra; Department of Air Force v. Rose, supra. And, even if it should be determined that information is within the scope of an exemption, an agency may determine that the information should, nevertheless, be released. 22/ As the Court of Appeals for the District of Columbia Circuit stated with respect to Exemption 4 in Charles River Park "A," Inc. v. Department of Housing and Urban Development, supra, 519 F. 2d at 940:

"If [information] is not found to be confidential under the FOIA, it must be disclosed on request even if it was submitted in confidence.

* * *

22/ The petitioners err in asserting (Pet. Br. 19) that "a balancing of public and private interests is a necessity in interpreting the FOIA". While the Supreme Court, in Department of Air Force v. Rose, supra, 425 U.S. at 371, held that a balancing of interests is appropriate to determine whether Exemption 6 of the FOIA is available, that holding is limited solely to situations involving a "clearly unwarranted invasion of personal privacy." No other FOIA exemption permits of this balancing test. Cf., Department of Air Force v. Rose, supra.

Pennzoil Co. v. Federal Power Commission, 534 F. 2d 627, (C.A. 5, 1976) and Continental Oil Co. v. Federal Power Commission, 519 F. 2d 31, (C.A. 5, 1975), certiorari denied, U.S. , 96 S. Ct. 2168 (1976), upon which petitioners rely (Pet. Br. 19), are not to the contrary. In Pennzoil and Continental, the Court of Appeals for the Fifth Circuit held that an agency should balance competing public and private interests prior to deciding whether to disclose information for which Exemption 4 of the FOIA was found to be available. Pennzoil and Continental nowhere suggest that a balancing test should be applied in determining the availability of Exemption 4.

"Even if it is found that the information is confidential and that disclosure is not required by the Act, it is still necessary to determine whether [an agency] can release the information.

* * *

"The basic purpose of the FOIA is to promote disclosure of information; acceptance of CRP's argument [that the FOIA should be interpreted as prohibiting agency disclosure of information that falls within one of the Act's exceptions] would tend to subvert that purpose. Although the legislative history of the Act does not expressly resolve the question of whether the FOIA can be invoked to stop disclosure of information, at least one leading commentator has no difficulty in concluding that '[t]he Act contains no provision forbidding disclosure The exemptions protect against required disclosure, not against disclosure.' K. Davis, Administrative Law Treatise §3A.5 (1970 Supp.). His conclusion is supported by the legislative history of the recently enacted amendments to the FOIA which make it clear that the Act is not to be interpreted in any way as a restriction on government disclosure. S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974); cf., H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1973), in U.S. Code Cong. & Admin. News, pp. 6267, 6269." (Citations and footnotes omitted.)

Pennzoil Co. v. Federal Power Commission, 534 F. 2d 627 (C.A. 5, 1976), relied upon by the petitioners (Pet. Br. 8, 19), is in accord with Charles River Park "A", supra. There, the Court of Appeals for the Fifth Circuit, rejecting the petitioner's argument "that the Freedom of Information Act (FOIA), 5 U.S.C. 552, is an absolute bar to the release of" certain information, stated:

"We believe that this argument distorts the clear intent of the Freedom of Information Act. The Supreme Court has repeatedly stated that the basic thrust of the Freedom of Information Act is 'to permit access to official information long shielded unnecessarily from public view.' Environmental Protection Agency v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). See also, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir. 1976); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973). The Court, moreover, has recently reaffirmed that the thrust of the act is toward disclosure. Department of the Air Force v. Rose, ___ U.S. ___, 96 S.Ct.

1592, 48 L.Ed.2d 11, 44 L.W. 4503 (1976). Interpreting the statute as an absolute bar to the release of certain information would be at war with the basic principles embodied in the Freedom of Information Act." 23/

23/ The petitioners argue (Pet. Br. 10) that Exemption 4 is "intended to protect the competitive position and the privacy of citizens who submit such information to the Government." In support thereof, the petitioners cite Bristol-Myers Co. v. Federal Trade Commission, 424 F. 2d 935 (C.A. D.C., 1970). While Bristol-Myers does refer to legislative history generally supporting this proposition, the court further stated that

"[t]he legislative history establishes that the primary purpose of the Freedom of Information Act was to increase citizens' access to government records.

* * *

"This provision [5 U.S.C. 552(b)(4)] serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers. Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny" (emphasis added, footnote omitted).

The petitioners also rely upon Continental Oil Co. v. Federal Power Commission, 519 F. 2d 31 (C.A. 5, 1975), certiorari denied, ___ U.S. ___, 96 S. Ct. 2168 (1976), as being contrary to the position in Charles River Park "A," supra, 519 F.2d at 941, that

"even if the subject information falls within the exemption from disclosure for trade secrets or privileged or confidential information, it is still not prohibited from disclosing the information."

However, the court in Continental Oil Co., supra, 519 F. 2d at 35, noted that its decision was made "without reaching any situation broader than that presented" to it. There, in marked contrast to the situation in this case, the Federal Power Commission had decided to disclose confidential information concerning an area which it did not regulate, and which it had only tangential authority to require to be filed with the Commission. Cf., Section 17A of the Securities and Exchange Act.

2. The petitioners' "issuer lists" are not entitled to confidential treatment under Section 24 of the Securities Exchange Act nor the applicable rules thereunder.

Section 24 does not require the Commission to withhold any data from the public. ^{25/} Indeed, it was precisely because former Section 24 did require the Commission to withhold information that the Congress amended that Section. As amended, Section 24 simply makes it unlawful for any individual member of the Commission or its staff to disclose such data when to do so (1) would be in contravention of the rules and regulations adopted by the Commission pursuant to the FOIA or (2) contrary to a determination by the Commission not to make the information public. In the instant case, the Commission determined that the information in question should be made public, and its decision in this regard is consistent with the rules and regulations adopted by the Commission under the FOIA. The rules reflect the exemptions from the FOIA, and set forth a procedure for determinations regarding requests for the disclosure of "any record that is generally considered nonpublic [pursuant to 17 CFR 200.80(b)]," 17 CFR 200.80(d)(5), and provide that, upon review of an initial staff decision on an FOIA request, the Commission "may disclose a record, even if exempt, if the * * * [requesting person] shows good cause why it should do so." ^{26/} 17 CFR 200.80(d)(6)(iv). Thus, disclosure of the petitioners' "issuer lists" would not be in contravention of the Commission's rules under the FOIA, and, therefore, not in violation of Section 24, even if an exemption under the FOIA were available, but nonetheless

^{25/} See n. 7, supra.

^{26/} See 17 CFR 200.80(b), et seq.

the Commission had found good cause present in a request made under the FOIA for the disclosure of such lists. 27/

27/ The petitioners also failed to meet the procedural requirements for requesting confidential treatment of information filed with or otherwise obtained by the Commission, in that they did not physically segregate the "confidential portions" of the materials in question and did not, in the Commission's judgment, offer a sufficient discussion of the grounds and justification for an exemption from disclosure under the FOIA and the Commission's rules thereunder. At the time the petitioners' initial request was made, these procedures were set forth in proposed Securities Exchange Act Rule 24b-2. Securities Exchange Act Release No. 11774 (Oct. 30, 1975), 8 SEC Docket 287 (Nov. 11, 1975), which provided in part:

240.24b-2(b) "The person shall file * * * with the Commission:

(2) An application making objection to the disclosure of the confidential portion. Such application * * * shall contain (i) an identification of the portion [for which confidential treatment is requested]; (ii) a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act (17 CFR 200.80), and a justification of the period of time for which confidential treatment is sought * * * ."

The rule was adopted in final form on April 28, 1976 (Securities Exchange Act Release No. 12386 (April 28, 1976), 9 SEC Docket 475 (May 11, 1976) in substantially the form proposed.

The petitioners admit that they "did not physically segregate" the issuer lists for which they sought confidential treatment from the balance of the materials set forth in their Forms TA-1, but argue that "there could have been no confusion as to what material was intended to be kept confidential" (Pet. Br. 20-21). The petitioners rejected the staff's suggestion that they withdraw the filings made on November 11, 1975, and refile, with the materials for which confidential treatment was requested properly segregated. Instead, the petitioners suggested that the staff make such changes (R 3-4). The petitioners also contend that their letter of November 10, 1975, transmitting their Forms TA-1 to the Commission, "constitute[s] a sufficient statement of the grounds relied on for the exemption" (Pet. Br. 21). But, the petitioners' letter (R 1-2) never mentioned

(footnote continued)

CONCLUSION

For the foregoing reasons, the order of the Commission under review should be affirmed.

Respectfully submitted,

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

KATHRYN B. McGRATH
Assistant General Counsel

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Attorney

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Attorney

Securities and Exchange Commission
Washington, D.C. 20549

March, 1977

27/ (footnote continued)

the fact that this information was substantially available to the public, nor did it discuss why this information should be afforded confidentiality, notwithstanding its public availability. Such failure justified the Commission's determination that the "[p]etitioners have failed to demonstrate that the information at issue constitutes trade secrets or privileged or confidential commercial information exempt from disclosure, or information otherwise exempt from disclosure * * *" (R 22).

EXHIBIT A

SEE SUPPLEMENT FOR LATEST INFORMATION

AAA-AAA

AAI TRAILER SALES, INC. (Colo.)
(Common 25¢) 000288 10 0
First Independent Stock Transfer Agent,
Inc., Denver
(Transfer charge - \$1.50)
Stock Dividend - 10% 10/15/62

AAI CORP. (Md.)
(Common \$1) 000352 10 6
Co. Office, Box 6853,
Baltimore, Md. 21204

AAI CORP. (Del.)
(Common \$1) 000361 10 5
First National Bank, Chicago
Chase Manhattan Bank (N.Y.), New York
(D.D.A.) - First National Bank
Common \$1 par split (1.25) for (1) by is-
surance of (0.25) additional share 2/8/72

AAV COMPANIES (Ohio)
(Common W.P.) 000368 10 0
Cleveland Trust Co., Cleveland
(N.Y.C. Drop for Cleveland Trust Co.
is Bank of New York)
Chase Manhattan Bank (N.Y.), New York
(D.D.A.) - Cleveland Trust Co.

A & E PLASTIK PAK CO., INC. (Del.)
(Common \$1) 000032 10 2
Union Bank, Los Angeles
United States Trust Co., New York
(D.D.A.) - Union Bank

A & F INVESTING CO., INC. (S.C.)
(Common \$100) 000096 10 7
Co. Office, 360 Lexington Ave.,
New York, N.Y. 10017

A.B.A. INDUSTRIES, INC. (Fla.)
(Common 10¢) 000370 10 6
First National Bank, Tampa, Fla.

A B C ASSOCIATES, INC. (Ill.)
(Common 1¢) 000384 10 7
Co. Office, 1 Van Terrace, Sparkhill,
N.Y. 10976
(Transfer charge - \$5)

ABC INDUSTRIES, INC. (N.Y.)
(Capital 10¢) 000736 10 8
Chemical Bank, New York

ABG INDUSTRIES, INC. (Del.)
(Common 10¢) 000768 10 1
First Union National Bank of North
Carolina, Charlotte
(N.Y.C. Drop - Manufacturers Hanover
Trust Co.)

ABT ASSOCIATES, INC. (Mass.)
(Ser. A Common N.P.) nm (See Note)
(Ser. B Common N.P.) nm (See Note)
(Note: Certificates read Common \$1 par
and show Cusip 003869 10 4 but
certificates were printed in anticipation
of a reclassification which was
abandoned. Ser. A Common and Ser. B
Common are still outstanding and a
different identification number should be
given to each)
State Street Bank & Trust Co., Boston

AC & S CORP. (Pa.)
(Common \$1) 000792 10 1
Co. Office, 120 E. Line St.,
Lancaster, Pa. 17604

ACP INDUSTRIES, INC. (N.Y.)
(Common N.P.) 000800 10 2
Borah Guaranty Trust Co., New York
Common \$25 par changed to no par and
(1) additional share issued 9/24/63
Each share 7% Preferred \$100 par ex-
changed for \$4 cash and (2) shares 5%
Preferred \$50 par in 1954 which was
redeemed 1/18/57
Common no par split (2) for (1) by is-
surance of (1) additional share 9/20/65
Common no par split (1.5) for (1) by is-
surance of (0.5) additional share 6/22/76

ACL LABORATORIES INTERNATIONAL INC.
(New York)
(Common 1¢) 000867 10 1

ACL LABORATORIES INTERNATIONAL INC.
(Cont'd)
Continental Stock Transfer & Trust Co.,
New York
(Transfer charge - \$2)

A.C. ORGANIZATION LTD. (N.Y.)
(Common 1¢) 000869 10 7
Columbia Transfer Co.,
Massapequa, N.Y.
(Transfer charge - \$2)

ACS INDUSTRIES, INC. (R.I.)
(Common 10¢) 000874 10 7
Industrial National Bank of Rhode Island,
Providence

"A" CO. (Calif.)
(Common 10¢) 000880 10 4
California First Bank, San Diego
Common no par changed to 10¢ par
1/31/73

ADA FINANCIAL SERVICE CORP. (N.J.)
(See ADA as a word)

A.D. DATA SYSTEMS, INC. (N.Y.)
(Common 50¢) 000889 10 5
Security Trust Co., Rochester, N.Y.

ADM INDUSTRIES, INC. (Ind.)
(Common N.P.) 000896 10 0
Harris Trust & Savings Bank, Chicago
Manufacturers Hanover Trust Co.,
New York
(D.D.A.) - Harris Trust & Savings Bank

A E & C I LTD. (South Africa)
(ADR's for Ord. Rand-50¢) 001012 20 2
Citibank, S.A., New York

ADG-TELEFUNKEN (Germany)
(ADR's for Common Capital DM50)
001028 20 8
Chemical Bank, New York
(Transfer charge - \$1.50)
(ADR's for Bearer DM50) 001028 20 8
Morgan Guaranty Trust Co., New York

AEL INDUSTRIES, INC. (Pa.)
(Class A Common \$1) 001030 10 5
(Class B Common \$1) 001030 20 4
Provident National Bank, Philadelphia
(N.Y.C. Drop - Manufacturers Hanover
Trust Co.)

AER NICKEL CORP. LTD. (Ont.)
(See AER as a word)

AES TECHNOLOGY SYSTEMS, INC. (Del.)
(Common 1¢) 001032 10 1
Continental Illinois National Bank &
Trust Co., Chicago
(N.Y.C. Drop - Schroeder Trust Co.)

APA PROTECTIVE SYSTEMS, INC. (N.Y.)
(Common \$1) 001038 10 8
Bankers Trust Co., New York
Stock Dividend - 100% 4/1/71

A.F. LIQUIDATING CORP. (No.)
(Common \$1) nm
In process of liquidation
Each share Common \$1 par exchanged for
initial distribution of (0.05581) share
4% Conv. Preferred Ser. B \$100 par and
(0.20064) share Capital Stock no par of
International Telephone & Telegraph Corp.
(N.Y.) 8/31/64
International Telephone & Telegraph
Corp. (N.Y.) reincorporated under the
laws of Delaware 1/31/68

APF JAPAN FUND LTD. (Canada)
(Mutual Fund Shares \$1) 001091 10 7
Montreal Trust Co., Montreal, Calgary
Halifax, Regina, Toronto, Vancouver &
Winnipeg
(D.D.A.) - Canadian Security Management
Ltd., Canada Square, 2200 Yonge St.,
Toronto

**A.G.F. MANAGEMENT LTD.-LA SOCIETE DE
GESTION A.G.F. LTEE. (Ont.)**
(Class B Pfd. N.P.) 001092 10 5

**A.G.F. MANAGEMENT LTD.-LA SOCIETE DE
GESTION A.G.F. LTEE. (Cont'd)**
Montreal Trust Co., Toronto, Montreal,
Winnipeg, Vancouver, Calgary & Halifax
(D.D.A.) - Montreal Trust Co., Toronto

A.G.F. SPECIAL FUND LTD. (Canada)
(Mutual Fund Shares \$1) 001104 10 9
(Deferred \$1) nm
A.G.F. Management Ltd., Toronto
Royal Trust Co., Vancouver, Calgary,
Montreal, Winnipeg, Halifax & Regina
(D.D.A.) - A.G.F. Management Ltd.

A/G INVESTMENT CO., INC. (S.C.)
(Common P.P.) nm
Co. Office, P.O. Drawer 808,
Greenville, S.C. 29602

AGH INDUSTRIES, INC. (Del.)
(Common \$1) 001220 10 2
Union Bank & Trust Co. (N.Y.),
Grand Rapids, Mich.
Common \$1 par split (1.333) for (1) by
issuance of (0.333) additional share
9/15/65
Common \$1 par split (1.333) for (1) by
issuance of (0.333) additional share
12/20/68

AGS COMPUTERS, INC. (N.Y.)
(Common 10¢) 001240 10 0
Registrar & Transfer Co., New York

AGT DATA SYSTEMS LTD. (Canada)
(Common N.P.) 001260 10 8
Canada Permanent Trust Co., Toronto,
Montreal, Calgary & Vancouver
(D.D.A.) - Canada Permanent Trust Co.,
Toronto

AIC PHOTO, INC. (Del.)
(Common \$1) 001348 10 1
Chase Manhattan Bank (N.Y.), New York

A.I.D. INC. (Colo.)
(Common \$1) 001358 10 0
Declared defunct and inoperative for
failure to pay taxes and file reports
10/19/74

A.I.S. RESOURCES LTD. (Bahamas)
(Common 10¢) 001430 10 7
Guaranty Trust Co. of Canada, Montreal
Banque Romande, Geneva, Switzerland
(Transfer charge - Montreal \$1)
(D.D.A.) - Guaranty Trust Co. of Canada

A I T S, INC. (Mass.)
(Common 10¢) 001444 10 8
First National Bank, Boston
(N.Y.C. Drop for First National Bank is
First National Boston Clearance Corp.)
Bank of New York, New York
(D.D.A.) - First National Bank

A.J. INDUSTRIES, INC. (Del.)
(Common \$2) 001476 10 0
Wells Fargo Bank N.A., Los Angeles
(N.Y.C. Drop - Wells Fargo Securities
Clearance Corp.)

A.K. ELECTRIC CORP. (N.Y.)
(Common 1¢) 001540 10 3
Registrar & Transfer Co., New York
(Transfer charge - \$2.25)

AKZO N.V. (Netherlands)
(See AKZO as a word)

A L D, INC. (Del)
(Common \$1) 001664 10 7
Republic National Bank, Dallas
(N.Y.C. Drop - Manufacturers Hanover
Trust Co.)

A LA CANADIENNE LTEE. (Que.)
(Class A, N.P.) nm
General Trust of Canada, Montreal

AME LTD. (Ont.)
(Capital N.P.) 001678 10 1
Canada Permanent Trust Co., Toronto

STATUTORY APPENDIX

Exemptions under the Freedom of Information Act, 5. U.S.C.552(b).

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Section 17A of the Securities Exchange Act of 1934, 15 U.S.C. 78q-1 provides in pertinent part.

National System for the Clearance and Settlement of Securities Transactions

SEC. 17A.¹ (a) (1) The Congress finds that—

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(2) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this title to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempted securities) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. The Commission shall use its authority under this title to assure equal regulation under this title of registered clearing agencies and registered transfer agents.

* * *

(c)(1) Except as otherwise provided in this section, it shall be unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to any security registered under section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(C) of that section. The appropriate regulatory agency, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any person or security or class of persons or securities from any provision of this section or any rule or regulation prescribed under this section, if the appropriate regulatory agency finds (A) that such exemption is in the public interest and consistent with the protection of investors and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds, and (B) the Commission does not object to such exemption.

(2) A transfer agent may be registered by filing with the appropriate regulatory agency for such transfer agent an application for registration in such form and containing such information and documents concerning such transfer agent as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section. Except as hereinafter provided, such registration shall become effective thirty days after receipt of such application by such appropriate regulatory agency or within such shorter period of time as such appropriate regulatory agency may determine.

Section 24 of the Securities Exchange Act of 1934, 15 U.S.C. 78x provides:

Public Availability of Information

SEC. 24. (a) For purposes of section 552 of title 5, United States Code, the term "records" includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this title or otherwise.

(b) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5, United States Code, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information. Nothing in this subsection shall authorize the Commission to withhold information from the Congress.

Section 25 of the Securities Exchange Act of 1934, 15 U.S.C. 78y provides in pertinent part.

Court Review of Orders and Rules.

SEC. 25. (a)(1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

* * *

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

RULES OF GENERAL ORGANIZATION

Rule 30-1(d)(3), 17 CFR 200.30-1

**§ 200.30-1 Delegation of authority to
Director of Division of Corporation
Finance.**

Pursuant to the provisions of Public Law No. 87-592, 76 Stat. 394 (15 U.S.C. 78d-1, 78d-2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Corporation Finance, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

* * *

(d) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 78a, et seq.):

(3) (i) To grant and deny applications for confidential treatment filed pursuant to Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 thereunder (240.24b-2 of this chapter);

Rule 30-3, 17 CFR 200.30-3

**§ 200.30-3 Delegation of authority to
Director of Division of Market Reg-
ulation.**

Pursuant to the provisions of Public Law No. 87-592, 76 Stat. 394, (15 U.S.C. 78d-1, 78d-2), the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Market Regulation to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Securities Exchange Act of 1934 (15 U.S.C. 73a, et seq.):

(20) (i) To grant and deny applications for confidential treatment filed pursuant to Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 thereunder (240.24b-2 of this chapter);
(ii) To revoke a grant of confidential treatment for any such application.

§ 200.30 Commission records and information.

(b) **Nonpublic matters.** Certain records are nonpublic, but any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are considered nonpublic under the paragraph (b) of this section. Except for such reasonably segregable portions of records, the Commission will generally not publish or make available to any person matters that are:

(1) (i) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and (ii) are in fact properly classified pursuant to such executive order.

(2) Related solely to the internal personnel rules and practices of the Commission or any other agency of the Government of the United States, including operation rules, guidelines, and manuals of procedure for investigators, auditors, and other employees other than those which establish legal requirements to which members of the public are expected to conform.

(3) Specifically exempted from disclosure by statute, including:

(i) Information contained in any notification, statement, application, declaration, report, or other document or record filed with or received by the Commission as required or permitted by law which is entitled to confidential treatment by operation or application of the provision of Clause 30 of Schedule A of the Securities Act of 1933 and Rule 485 (17 CFR 230.485) thereunder, section 22 of the Public Utility Holding Company Act of 1935 and Rule 104(b) (17 CFR 250.104(b)) thereunder, section 321(b) of the Trust Indenture Act of 1939, section 33(b) of the Investment Company Act of 1940 and Rule 45a-1 (17 CFR 270.45a-1) thereunder, or section 210 of the Investment Advisers Act of 1940; and

(ii) Information concerning administrative proceedings which are nonpublic pursuant to the provisions of section 22 of the Securities Exchange Act of 1934, section 19 of the Public Utility Holding Company Act of 1935, section 320 of the Trust Indenture Act of 1939, section 41 of the Investment Company Act of 1940, or section 212 of the Investment Advisers Act of 1940.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential, including:

(i) Information contained in letters of comment in connection with registration statements, applications for registration or other material filed with the Commission, replies thereto, and related material which is deemed to have been submitted to the Commission in confidence or to be confidential at the instance of the registrant or person who has filed such material unless the contrary clearly appears; and

(ii) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only, such as preliminary proxy material filed pursuant to Rule 14a-6 under the Securities Exchange Act (17 CFR 240.14a-6), reports filed pursuant to Rule 316(a) under the Securities Act (17 CFR 230.316(a)), agreements filed pursuant to Rule 15c-3-1(c) (7) (G) under the Securities Exchange Act (17 CFR 240.15c3-1(c) (7) (vii)), schedules filed pursuant to Part II of Form X-17A-5 (17 CFR 249.617) in accordance with Rule 17a-5(b) (3) under the Securities Exchange Act (17 CFR 240.17a-5(b) (3)), statements filed pursuant to Rule 17a-5(k) (1) under the Securities Exchange Act (17 CFR 240.17a-5(k) (1)), and confidential reports filed pursuant to Rules 17a-9, 17a-10, 17a-12 and 17a-16 under the Securities Exchange Act (17 CFR 240.17a-9, 240.17a-10, 240.17a-12, and 240.17a-16); and

(iii) Information contained in reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other investigation.

(5) Interagency or intra-agency memoranda or letters, including generally records which reflect discussions between or consideration by members of the Commission or members of its staff, or both, of any action taken or proposed to be taken by the Commission or by any member of its staff, and specifically, reports, summaries, analyses, conclusions, or any other work product of members of the Commission or of attorneys, accountants, analysts, or other members of the Commission's staff, prepared in the course of an inspection of the books or records of any person whose affairs are regulated by the Commission, or prepared otherwise in the course of an examination or investigation or related litigation conducted by or on behalf of the Commission, except those which by law would routinely be made available to a party other than an agency in litigation with the Commission.

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, including those concerning all employees of the Commission and those concerning persons subject to regulation by the Commission, such as personal information about employees of brokers or dealers reported to the Commission pursuant to Rule 15b8-1(a) (2) (iii) under the Securities Exchange Act (17 CFR 240.15b8-1(a) (2) (iii)).

(7) Investigatory records compiled for law enforcement purposes to the extent that production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, or disclose the identity of a confidential source. In a particular case the Commission may also withhold investigatory records that would constitute an unwarranted invasion of personal privacy, disclose investigative techniques and procedures or endanger the life or physical safety of law enforcement personnel. Investigatory records include all documents, records, transcripts, correspondence and related memoranda and work product concerning examinations and other investigations and related litigation as authorized by law, which pertain to or may disclose the possible violations by any person of any provision of any of the statutes, rules, or regulations administered by the Commission; and all written communications from or to any person confidentially complaining or otherwise furnishing information respecting such possible violations, as well as all correspondence and memoranda in connection with such confidential complaints or information.

(8) Contained in or related to examinations, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; and

(9) Geological and geophysical information and data, including maps, concerning wells.

Rule 80(d)(5), 17 CFR 200.80(d)(5)

(d) *Requests for Commission records and copies thereof—*

(5) *Initial determinations, denials.*

With respect to any record that is generally considered nonpublic as described in paragraph (b) of this section, the Freedom of Information Act Officer of the Commission will determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of a request for inspection of the record or for a copy (or within such extended period as may be permitted in accordance with paragraph (7) of this subsection (d)) whether to comply with such request, and shall immediately notify the person making such request of such determination, and, where it is determined not to comply, the reasons therefor, and of the right of such person to appeal to the Commission any adverse determination: *Provided*, That a Director of a staff Division of the Commission or Office head whose zone of responsibility relates to the record requested (See 17 CFR 200.13, *et seq.*) may make a determination that the record or copy is not lawfully required to be made available and should not be made available, in which case he, and not the Freedom of Information Act Officer, shall make the required notification. The notification of denial of any request for records shall set forth the name and title or position of each person responsible for the denial.

Rule 80(d)(6)(iv), 17 CFR 200.80(d)(6)(iv)

(6) *Administrative review.* Any person who has been notified pursuant to paragraph (d)(5) of this section that his request for inspection of a record or for a copy has been denied, or who has received no response to a request for a record or copy within ten days (or within such extended period as may be permitted in accordance with paragraph (d)(7) of this section) after his request was received by the Commission's staff, may appeal the adverse determination or the failure to respond by applying for an order of the Commission determining and directing that the record be made available.

(iv) The Commission may determine to withhold any record that is exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, although it may disclose a record, even if exempt, if the application shows good cause why it should do so.

Rule 17Ac2-1 under the Securities Exchange Act of 1934,
17 CFR 240.17Ac2-1

§ 240.17Ac2-1 Application for registration of transfer agents.

(a) An application for registration, pursuant to section 17A(c) of the Act, of a transfer agent for which the Commission is the appropriate regulatory agency, as defined in section 3(a)(34) (B) of the Act, shall be filed with the Commission on Form TA-1, in accordance with the instructions contained therein and shall become effective on the thirtieth day following the date on which the application is filed, unless the Commission takes affirmative action to accelerate, deny or postpone such registration in accordance with the provisions of section 17A(c) of the Act.

(b) The filing of any amendment to an application for registration as a transfer agent pursuant to paragraph (a) of this section, which registration has not become effective, shall postpone the effective date of the registration until the thirtieth day following the date on which the amendment is filed, unless the Commission takes affirmative action to accelerate, deny or postpone the registration in accordance with the provisions of section 17A(c) of the Act.

(c) Within twenty-one calendar days following the date on which any information reported at items 1-6 of Form TA-1 becomes inaccurate, misleading or incomplete, the registrant shall file an amendment on Form TA-1 correcting the inaccurate, misleading or incomplete information. Within thirty calendar days following the close of any calendar year (beginning with the period from the date as of which registrant's application is prepared to December 31, 1976) during which the information required by item 7 of Form TA-1 becomes inaccurate, misleading or incomplete, the registrant shall file an amendment on Form TA-1 correcting the inaccurate, misleading or incomplete information.

(d) Every registration and amendment filed pursuant to this section shall constitute a "report" or "application" within the meaning of sections 17, 17A (c), and 32(a) of the Act.

Securities Exchange Act Release
No. 11774 (October 30, 1975),
8 SEC Docket 287

CONFIDENTIAL TREATMENT FOR INFORMATION
FILED PURSUANT TO THE SECURITIES EXCHANGE
ACT OF 1934; RESCISSION OF SECURITIES EX-
CHANGE ACT RULE 24b-2, PROPOSED NEW RULE
24b-2, AND AMENDMENT OF VARIOUS PROCEDURAL
RULES

(File No. S7-598)

(Comment period expires December 1, 1975)

The Commission today announced the rescission of Rule 24b-2 (17 CFR 240.24b-2) under the Securities Exchange Act of 1934 and the proposal for public comment of new Rule 24b-2 relating to confidential treatment of certain information required to be filed with the Commission, the amendment of 17 CFR 200.30-1 relating to authority of the Director of the Division of Corporation Finance ("Division") to process applications for confidential treatment, and the amendment of 17 CFR 201.2 relating to Commission review of decisions of the Division under the proposed Rule 24b-2. 1/ The procedures set forth in proposed Rule 24b-2 will be followed until a permanent rule is adopted.

Section 24 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78x, was recently amended by Section 19 of Public Law No. 94-29 (the Securities Acts Amendments of 1975.) 2/

Previously, Section 24 had prohibited, in subsection (a), the disclosure of trade secrets and processes, and had authorized, in subsection (b), the nondisclosure of any other type of information filed with the Commission pursuant to the Securities Exchange Act unless the Commission found disclosure to be in the public interest. See *American Sumatra Tobacco Corp.*, 7 SEC 1033, *affirmed*, *American Sumatra Tobacco Corp. v. Securities and Exchange Commission*, 110 F.2d 117 (C.A.D.C., 1940). Significantly, a determination under the former Section 24 that disclosure of information was not in the public interest could have been made in some circumstances when the information would not otherwise come within the exemptions from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552.

Section 24 now defines, in subsection (a), the term "records" to include "all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this title or otherwise." Subsection (b) of the

amended Section prohibits disclosure of any records in contravention of the rules and regulations of the Commission under the FOIA or in circumstances where the Commission has determined, pursuant to such rules, to afford confidential treatment for information contained in such records.

Rescission of Rule 24b-2

Rule 24b-2 (17 CFR 240.24b-2), promulgated under Section 24, established a procedure whereby persons filing documents with the Commission pursuant to the Securities Exchange Act could request confidential treatment for information contained therein. Pursuant to subsection (c) of the Rule, and the former provisions of Section 24, until the Commission had made a determination regarding such a request, the information in question could not be disclosed by the staff. Under subsection (e) of the Rule, a person requesting confidential treatment could also request a hearing thereon. Subsection (h) provided that if the Commission determined that disclosure of materials filed by the issuer of a security registered on any exchange was in the public interest, the issuer could withdraw such materials by withdrawing the registration of each security to which the material filed related.

The amendment to Section 24 has removed the statutory basis for Rule 24b-2 and, in effect, rescinded it.

Proposed New Rule 24b-2

Proposed Rule 24b-2 reads as follows (changes from ~~rescinded~~ Rule 24b-2 in *italics*):

"240.24b-2 Nondisclosure of information filed with the Commission and with any exchange.

(a) Any person filing any registration statement, report, application, statement, correspondence, notice or other document (herein referred to as the material filed) under the Act may make written objection to the public disclosure of any information contained therein in accordance with the procedure set forth below. *The procedure provided in this rule shall be the exclusive means of requesting confidential treatment of information required to be filed under the Act.*

(b) The person shall omit from the material filed the portion thereof which it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the material filed that the confidential portion has been so omitted and filed separately with the Commission. The person shall file with the copies of the material filed with the Commission:

(1) As many copies of the confidential portion, each clearly marked "Confidential Treatment," as there are copies of the material filed with the Commission and with any exchange. Each copy shall contain an appropriate identification of the item or other requirement involved and, notwithstanding that the confidential portion does not constitute the whole of the answer, the entire answer thereto; except that in case the confidential portion is part of a financial statement or

schedule, only the particular financial statement or schedule need be included. All copies of the confidential portion shall be in the same form as the remainder of the material filed;

(2) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion, and shall contain (i) an identification of the portion; (ii) a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act (17 CFR 200.80), and a justification of the period of time for which confidential treatment is sought; (iii) a written consent to the furnishing of the confidential portion to other government agencies, offices or bodies and to the Congress; and (iv) the name of each exchange, if any with which the material is filed.

The copies of the confidential portion and the application filed in accordance with this paragraph (b) shall be enclosed in a separate envelope marked "Confidential Treatment" and addressed to The Secretary, Securities and Exchange Commission, Washington, D. C. 20549.

(c) Pending a determination as to the objection filed the confidential portion will *not be made available to the public*.

(d)(1) If it is determined that the objection should be sustained, a notation to that effect will be made at the appropriate place in the material filed. *Such a determination will not preclude reconsideration whenever appropriate, such as upon receipt of any subsequent request under the Freedom of Information Act (5 U.S.C. 5552) and, if appropriate, revocation of the confidential status of all or a portion of the information in question. Where an initial determination has been made under this rule to sustain objections to disclosure, the Commission will attempt to give the person requesting confidential treatment advance notice, wherever possible, if confidential treatment is revoked.*

(2) *In any case where an objection to disclosure has been disallowed or where a prior grant of confidential treatment has been revoked, the person who requested such treatment will be so informed by registered or certified mail to the person or his agent for service. Pursuant to 17 C.F.R. 201.26, persons making objections to disclosure may petition the Commission for review of a determination by the Division disallowing objections or revoking confidential treatment.*

(e) *The confidential portion shall be made available to the public at the time and according to the conditions specified in subparagraphs (1)-(2) of this paragraph:*

(1) *Upon the lapse of five days after the dispatch of notice by registered or certified mail of a determination disallowing an objection, if prior to the lapse of such five days the person shall not have communicated to the Secretary of the Commission his intention to seek review by the Commission under 17 CFR 201.26 of the determination made by the Division; or*

(2) *If such a petition for review shall have been filed under 17 CFR 201.26, upon final disposition thereof adverse to the petitioner.*

(f) *If the confidential portion is made available to the public, one copy thereof shall be attached to each copy of the material filed with the commission and with each exchange."*

* * * * *

Under the proposed rule, information will be entitled to confidential treatment only if it is considered non-public under the Commission's FOIA rules (17 CFR 200.80). This determination would be made at the time an application for confidential treatment is filed pursuant to proposed Rule 24b-2, but would be reconsidered whenever appropriate, such as when a request for the information is filed under the FOIA. Persons who have applied for and received confidential treatment for information pursuant to the proposed rule will be contacted by the staff whenever additional information is required in order to determine whether continued confidential treatment is warranted. If it is determined that a continuation of confidential treatment is not warranted, the confidential treatment will be revoked and the person who requested such treatment will be so notified wherever possible.

Determinations to grant, deny or revoke confidential treatment will be made by the Director of the Division of Corporation Finance. Persons may petition the Commission for review of his determinations under 17 CFR 201.26; the Commission will accord expedited treatment to all such petitions for review to the extent necessary to respond to a pending request under the FOIA within the time limits prescribed by that statute. See 5 U.S.C. 5552(a)(6)(A).

Status of Information Subject to Objections Filed Under Former Section 24

The status of information which is the subject of pending or past objections under the former provisions of Section 24 turns upon the same basic premise. In each instance the information in question was presumably required to be filed by the provisions of the Securities Exchange Act. In former Section 24, Congress had established conditions under which such information could be made available to the public despite objections — "when in [the Commission's] judgment a disclosure of such information is in the public interest" By amending these provisions, Congress has established somewhat different conditions for release of such information — essentially those prescribed by the FOIA.

We do not believe that any person has a "vested right," or any right at all, in the conditions of former Section 24 which would entitle him to insist on the continued applicability thereof. Similarly, no one has a "vested right" in the terms of the original exemptions from the disclosure requirements of the Freedom of Information Act. Some of these exemptions were significantly narrowed by Congress in 1974. Thus, amended Section 24 now governs the disclosure to the public of information filed pursuant to the Securities Exchange Act, whether objections to disclosure of such information were filed and sustained prior

to the effective date of the amendment to that Section or whether they have been filed and are still pending.

Interim Procedures

In order that information not entitled to confidential treatment is not withheld from the public unnecessarily, the procedures outlined in the proposed new rule will be followed until a final rule is adopted. Accordingly, those procedures should hereafter be followed by persons who apply for confidential treatment.

Persons who have already filed applications for confidential treatment pursuant to former Rule 24b-2 which are still pending should supplement their applications with an explanation of why the information may be considered to be exempt from the disclosure requirements of the FOIA under the Commission's FOIA rules, set forth at 17 CFR 200.80. The staff will contact each person whose application is pending and request such a statement.

Those who in the past have requested and been granted confidential treatment under the provisions of former Rule 24b-2 are advised that, while that information will continue to be maintained in non-public files until reconsideration of its confidential status, the disclosure requirements of the FOIA will ultimately apply. Such persons may, if they desire, submit supplementary information stating why the information in question may be considered to be exempt from the disclosure requirements of the FOIA under the Commission's FOIA rules set forth at 17 CFR 200.80. Where confidential treatment is revoked, the person who requested such treatment will be so notified wherever possible and may petition for review pursuant to 17 CFR 200.26.

Amendment of 17 CFR 200.30-1

The Commission has delegated authority to the Director of the Division of Corporation Finance to process applications for confidential treatment of information required to be filed under the Act. 17 CFR 200.30-1(d)(3) heretofore provided:

(i) To grant applications for confidential treatment of contract provisions under Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 thereunder (240.24b-2 of this chapter);

(ii) To accord confidential treatment to material other than contract provisions filed pursuant to Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 thereunder (240.24b-2 of this chapter), but only when the Commission has previously by order granted confidential treatment to the same information;

(iii) To schedule hearings on applications pursuant to Section 24(b) of the Act (15 U.S.C. 24x(b)) and Rule 24b-2 (240.24b-2 of this chapter) thereunder; and to deny any such application as to which the applicant waives his right to a hearing, provided such applicant is advised of his right to have such denial reviewed by the Commission.

In order to implement procedures in proposed Rule

24b-2, 17 CFR 200.30-1(d)(3) is amended to provide:

(i) To grant and deny applications for confidential treatment filed pursuant to Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 thereunder (240.24b-2 of this chapter);

(ii) To revoke a grant of any such application for confidential treatment.

Amendment of 17 CFR 201.26

Rule 26 of the Commission's Rules of Practice is amended by adding thereto subparagraph 201.26(b)(5) to provide that decisions made by the Division pursuant to the delegated authority contained in 17 CFR 200.30-1(d)(3) (amended as set forth above) shall be reviewable by the Commission on petition of the party seeking confidential treatment, in accordance with the procedure outlined in 17 CFR 201.26. The subparagraph added by the amendment to the Rule provides as follows:

(5) Article 30-1(d)(3), §200.30-1(d)(3) of this chapter, regarding the grant, denial, or revocation of a prior grant, of applications for confidential treatment for information filed with the Commission and with any exchange.

Amendment to 17 CFR 201.25

Rule 25 of the Commission's Rules of Practice sets forth procedures which govern applications for confidential treatment made under the provisions of the various statutes administered by the Commission. Since it is intended that the procedure to govern requests for confidential treatment for documents filed under the Securities Exchange Act shall be the procedure set forth in proposed Rule 24b-2, Rule 25 of the Rules of Practice, 17 CFR 201.25 is amended to delete the reference therein to Section 24(b) of the Securities Exchange Act and Rule 24b-2 thereunder and, as amended, now provides:

(a) *Requests for confidential treatment.* Confidential treatment of material listed in §201.25(a) may be requested for good cause where authorized by statute. Requests for confidential treatment may be made pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933 and §230.485 of this chapter thereunder, section 22(b) of the Public Utility Holding Company Act of 1935 and §250.104 of this chapter thereunder, section 45(a) of the Investment Company Act of 1940 and §270.45a-1 of this chapter thereunder, or section 210(a) of the Investment Advisers Act of 1940. In any case where a hearing for the purpose of taking testimony relating to whether confidential treatment should be granted or continued is to be held, the Commission may in its discretion, prior to the hearing, require the person desiring the confidential treatment to furnish in writing additional information in respect of its grounds of objection to public disclosure. Failure to supply the information so requested within 15 days from the date of receipt by the registrant of a notice of the information required, shall be deemed a waiver of the objections to public disclosure of that portion of the information filed confidentially with respect to which the additional information required by the Commission relates, unless the

Commission shall otherwise order for good cause shown at or before the expiration of such 15-day period.

(b) Procedure in confidential treatment cases.

(1) All papers containing data as to which confidential treatment is sought, together with any application making objection to the disclosure thereof, or other papers relating in any way to such application, shall be made available to the public only in accordance with orders of the Commission and/or the applicable provisions of §§230.485 or 250.104 of this chapter (Rule 485 issued under the Securities Act of 1933, Rule 104 issued under the Public Utility Holding Company Act of 1935), section 45 of the Investment Company Act of 1940 and §270.45a-1 of this chapter (Rule 45a-1 issued under that Act), or section 210(a) of the Investment Advisers Act of 1940.

(2) Proposed findings and conclusions and briefs in support of such proposed findings and conclusions, an initial decision, any petition for Commission review thereof, and any briefs pursuant to Commission order for review which are filed in connection with any proceeding concerning confidential treatment shall, unless otherwise ordered by the Commission, be for the confidential use only of the hearing officer, the Commission, the parties and counsel. The initial page of copies of such an initial decision will contain a statement that such decision is nonpublic. The order of the Commission sustaining or denying the application for confidential treatment shall be made available to the public. Any findings or opinion issued by a hearing officer or by the Commission in any proceeding relating to confidential treatment shall be made public at such time as the material filed confidentially is made available to the public.

(c) [Reserved]

(d) Purchase of transcripts of private hearings. Transcripts of private hearings will be supplied to the parties at the prescribed rates.

Amendment of 17 CFR 200.80(b)(3)

The Commission's rules under the FOIA now refer to Section 24 of the Securities Exchange Act and Rule 24b-2 thereunder as provisions pursuant to which information could be exempt from the disclosure requirements of the FOIA when its disclosure was not in the public interest. Since, as noted above, Section 24(b) now makes the status of information dependent on the provisions of the FOIA, that section can no longer be considered a substantive statutory exemption within the meaning of the third exemption of the FOIA, 5 U.S.C. §552(b)(3). Accordingly, 17 CFR 200.80(b)(3) is amended to delete the references contained therein to Section 24 and Rule 24b-2 and, as amended, now provides:

(3) Specifically exempted from disclosure by statute, including:

(i) Information contained in any notification, statement, application, declaration, report, or other document or record filed with or received by the Commission as required or permitted by law which is entitled to confidential

treatment by operation or application of the provision of Clause 30 of Schedule A of the Securities Act of 1933 and Rule 485 (17 CFR 230.485) thereunder, section 22 of the Public Utility Holding Company Act of 1935 and Rule 104(b) (17 CFR 250.140(b)) thereunder, section 321(b) of the Trust Indenture Act of 1939, section 33(b) of the Investment Company Act of 1940 and Rule 45a-1 (17 CFR 270.45a-1) thereunder, or section 210 of the Investment Advisers Act of 1940; and

(ii) Information concerning administrative proceedings which are nonpublic pursuant to the provisions of section 22 of the Securities Exchange Act of 1934, section 19 of the Public Utility Holding Company Act of 1935, section 320 of the Trust Indenture Act of 1939, section 41 of the Investment Company Act of 1940, or section 212 of the Investment Advisers Act of 1940.

To the extent the foregoing, in view of the amendment to Section 24, is not merely interpretative or a general statement of Commission policy, it is considered to relate to agency organization, practice and procedure rather than to substantive matters. ^{3/} Thus, with respect to the rescission of Rule 24b-2, the establishment of interim procedures and the amendment of 17 CFR 200.30-1(d)(3), 201.26, 201.25, and 200.80(b)(3), the provisions of 5 U.S.C. 553 regarding notice, procedures and publication prior to effective date are not applicable. Accordingly, they are effective upon publication of this notice in the *Federal Register*.

Pursuant to Section 23(a)(2) of the Securities Exchange Act, the Commission has considered the impact that these amendments and this proposal would have on competition and is not aware, at this time, of any burden that such rules would impose on competition not necessary or appropriate in furtherance of the purposes of that Act. However, the Commission specifically invites comment as to the competitive impact of this proposal, if adopted.

Proposed Rule 24b-2 (17 CFR 240.24b-2) is proposed pursuant to Sections 23 and 24 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78w and 78x, and the Freedom of Information Act, 5 U.S.C. §552. All interested persons are invited to submit written comments, to be received not later than December 1, 1975, to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, Washington, D. C. 20549. Such submissions should refer to File No. S7-598, and will be available for public inspection.

By the Commission.

George A. Fitzsimmons
Secretary

^{1/} The Commission also announces the amendment of 17 CFR 201.25 and 17 CFR 200.80(b)(3) to delete references to Rule 24b-2 which are no longer appropriate.

^{2/} Public Law No. 94-29 was signed by the President on June 4, 1975 at which time, as provided by Section 31(a) thereof, Section 19 became effective.

^{3/} To the extent a rule is inconsistent with its statutory basis, it is, of course, invalid. See *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 124 (1936).

Securities Exchange Act Release
No. 12386 (Apr. 28, 1976),
9 SEC Docket 475 (May 11, 1976)

CONFIDENTIAL TREATMENT OF INFORMATION FILED
WITH THE COMMISSION AND WITH ANY EXCHANGE

The Commission today announced the adoption of new Rule 24b-2 under Section 24 of the Securities Exchange Act of 1934 (17 CFR 240.24b-2) relating to confidential treatment of certain information filed with the Commission. Section 24 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78x, was amended by Section 19 of Public Law No. 94-29 (the Securities Acts Amendments of 1975).¹

Previously, Section 24 had prohibited, in subsection (a), the disclosure of trade secrets and processes, and had authorized in subsection (b), the nondisclosure of any other type of information filed with the Commission pursuant to the Securities Exchange Act unless the Commission found disclosure to be in the public interest. See *American Sumatra Tobacco Corp. v. SEC* 1033, affirmed, *American Sumatra Tobacco Corp. v. Securities and Exchange Commission*, 110 F. 2d 117 (C.A.D.C. 1940). A determination under former Section 24 that disclosure of information was not in the public interest could have been made in some circumstances.

¹ Public Law No. 94-29 was signed by the President on June 4, 1975 at which time, as provided by Section 31(a) thereof, Section 19 became effective.

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when the information would not otherwise come within the exemptions from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552.

Section 24 now defines, in subsection (a), the term "records" to include "all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this title or otherwise." Subsection (b) of the amended Section prohibits disclosure of any records in contravention of the rules and regulations of the Commission under the FOIA or in circumstances where the Commission has determined, pursuant to such rules, to afford confidential treatment for information contained in such records.

The amendment to Section 24 removed the statutory basis for Rule 24b-2 and the Commission rescinded it in Securities Exchange Act Release No. 11774.

The rescinded Rule 24b-2 (17 CFR 240.24b-2), promulgated under Section 24, established a procedure whereby persons filing documents with the Commission pursuant to the Securities Exchange Act could request confidential treatment for information contained therein. Pursuant to subsection (c) of the rescinded Rule, and the former provisions of Section 24, until the Commission had made a determination regarding such a request, the information in question could not be disclosed by the staff. Under subsection (e) of the rescinded Rule, a person requesting confidential treatment could also request a hearing thereon. Subsection (h) provided that if the Commission determined that disclosure of materials filed by the issuer of a security registered on any exchange was in the public interest, the issuer could withdraw such materials by withdrawing the registration of each security to which the material filed related.

Under new Rule 24b-2, information will be entitled to confidential treatment only if it is required to be filed and considered nonpublic under the Commission's FOIA rules (17 CFR 200.80). This determination would be made at the time an application for confidential treatment is filed pursuant to proposed Rule 24b-2, but would be reconsidered whenever appropriate, such as when a request for the information is filed under the FOIA. Persons who have applied for and received confidential treatment for information pursuant to the proposed rule will be contacted by the staff whenever additional information is required in order to determine whether continued confidential treatment is warranted. If it is determined that a continuation of confidential treatment is not warranted, the decision to accord such treatment will be revoked and the requesting person will be so notified wherever possible.

Determinations to grant, deny or revoke confidential treatment will be made by the Directors of the Divisions of Corporation Finance and Market Regulation. Persons may petition the Commission for review of their determinations under 17 CFR 201.26 and no disclosure of information will be made until such Commission review has been completed. The Commission will accord expedited treatment to all such petitions for review to the extent necessary to respond to a pending request under the FOIA within the time limits prescribed by that statute. See 5 U.S.C. Section 552 (a)(6)(A).

No provision is made in this rule for confidential treatment of

information received by the Commission which is not required to be filed pursuant to the Act. The Commission intends that any records received by the Commission which are not subject to the provisions of any specific rule governing requests for confidential treatment shall be subject to rules which it expects to publish in the near future.

Confidential treatment pursuant to Rule 485 of information filed under the Securities Act of 1933 may have the effect of establishing a basis for confidential treatment under Rule 24b-2 when the same information is required to be filed under the Exchange Act. Accordingly, in considering applications for confidential treatment filed under Rule 485 the staff will consider the length of time for which confidential treatment is sought so that the information will not be kept confidential indefinitely for Exchange Act purposes unless appropriate under the FOIA. In the future, applications for confidential treatment pursuant to Rule 485 should justify the length of time for which such treatment is sought.

Pursuant to Section 23(a)(2) of the Securities Exchange Act, the Commission has considered the impact that this amendment will have on competition and has determined that this rule will not impose any burden not warranted by the FOIA on competition.

Those who in the past have requested and been granted confidential treatment under the provisions of former Rule 24b-2 are advised that, while that information will continue to be maintained in non-public files until reconsideration of its confidential status, the disclosure requirements of the FOIA are applicable.

17 CFR Part 240 is amended by adopting a new Section 240.24b-2 as set forth below with changes from the version set forth in Release No. 11774 underlined. This amendment shall become effective 30 days after publication in the Federal Register.

Section 240.24b-2. Nondisclosure of information filed with the Commission and with any exchange.

(a) Any person filing any registration statement, report, application, statement, correspondence, notice or other document (herein referred to as the material filed) pursuant to the Act may make written objection to the public disclosure of any information contained therein in accordance with the procedure set forth below. The procedure provided in this rule shall be the exclusive means of requesting confidential treatment of information required to be filed under the Act.

(b) The person shall omit from material filed the portion thereof which it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the material filed that the confidential portion has been so omitted and filed separately with the Commission. The person shall file with the copies of the material filed with the Commission:

(1) As many copies of the confidential portion, each clearly marked, "Confidential Treatment", as there are copies of the material filed with the Commission and with any exchange where such material is required to be filed. Each copy shall contain an appropriate identification of the item or other requirement involved and, notwithstanding that the confiden-

tial portion does not constitute the whole of the answer, the entire answer thereto; except that in case the confidential portion is part of a financial statement or schedule only the particular financial statement or schedule need be included. All copies of the confidential portion shall be in the same form as the remainder of the material filed:

(2) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion, and shall contain (i) an identification of the portion; (ii) a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act (17 CFR 200.80), and a justification of the period of time for which confidential treatment is sought; (iii) a written consent to the furnishing of the confidential portion to other government agencies, offices or bodies and to the Congress; and (iv) the name of each exchange, if any, with which the material is filed.

The copies of the confidential portion and the application filed in accordance with this paragraph (b) shall be enclosed in a separate envelope marked "Confidential Treatment" and addressed to The Secretary, Securities and Exchange Commission, Washington, D.C. 20549.

(c) Pending a determination as to the objection filed the material for which confidential treatment has been applied will not be made available to the public.

(d) (1) If it is determined that the objection should be sustained, a notation to that effect will be made at the appropriate place in the material filed. Such a determination will not preclude reconsideration whenever appropriate, such as upon receipt of any subsequent request under the Freedom of Information Act (5 U.S.C. Section 552) and, if appropriate, revocation of the confidential status of all or a portion of the information in question. Where an initial determination has been made under this rule to sustain objections to disclosure, the Commission will attempt to give the person requesting confidential treatment advance notice, wherever possible, if confidential treatment is revoked.

(2) In any case where an objection to disclosure has been disallowed or where a prior grant of confidential treatment has been revoked, the person who requested such treatment will be so informed by registered or certified mail to the person or his agent for service. Pursuant to 17 CFR 201.26, persons making objections to disclosure may petition the Commission for review of a determination by the Division disallowing objections or revoking confidential treatment.

(e) The confidential portion shall be made available to the public at the time and according to the conditions specified in subparagraphs (1)-(2) of this paragraph.

(1) Upon the lapse of five days after the dispatch of notice by registered or certified mail of a determination disallowing an objection, if prior to the lapse of such five days the person shall not have communicated to the Secretary of the Commission his intention to seek review by the Commission under 17 CFR 201.26 of the determination made by the Division; or

(2) If such a petition for review shall have been filed under

17 CFR 201.26, upon final disposition thereof adverse to the petitioner.

(f) If the confidential portion is made available to the public, one copy thereof shall be attached to each copy of the material filed with the Commission and with each exchange.

(Secs. 23, 24, 48 Stat. 901, as amended, 80 Stat. 383, as amended, 31 Stat. 54; 15 U.S.C. 78w, 78x, 5 U.S.C. 552).

Amendment of 17 CFR 200.30-3

The Commission has delegated authority to the Director of the Division of Market Regulation to process applications for confidential treatment of information filed under the Act. In order to implement procedures in Rule 24b-2, 17 CFR 200.30-3 (a) is amended to provide:

(1) through (19) - no change.

(20) (i) To grant and deny applications for confidential treatment filed pursuant to Section 24(b) of the Act (15 U.S.C. 78x(b)) and Rule 24b-2 hereunder (240.24b-2 of this chapter); (ii) To revoke a grant of confidential treatment for any such application.

By the Commission

George A. Fitzsimmons
Secretary

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONTINENTAL STOCK TRANSFER AND TRUST COMPANY	:	
(A Limited Purpose Trust Company) And	:	
GENERAL STOCK TRANSFER COMPANY,	:	
	:	
Petitioners,	:	No. 77-4034
	:	
V.	:	
	:	
SECURITIES AND EXCHANGE COMMISSION	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1977, I caused copies of the foregoing ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, Respondent, to be mailed, postage prepaid, to the following individual:

Jesse R. Meer, Esquire
Berlack, Israels & Liberman
26 Broadway
New York, New York 10004

Kathryn B. McGrath
Kathryn B. McGrath
Assistant General Counsel

Securities and Exchange Commission
Washington, D.C. 20549